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No. 82-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNETH WILLIAM WHEAT,

Petitioner,

—against—

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

What safeguards are required by the Eighth and Fourteenth Amendments to the Constitution to ensure a reliable determination of a criminal defendant's ability to understand the proceedings against him and to assist in his defense in a capital case?

Whether petitioner's rights under the Eighth and Fourteenth Amendments not to be tried and sentenced to death while incompetent were violated where the trial court decided the question of his competency upon the basis of two brief colloquies with the petitioner in open court and without the benefit of any diagnosis or evaluation by a mental health professional or other information elucidating the nature and extent of petitioner's mental problems.

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OCTOBER TERM, 1982

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KENNETH WILLIAM WHEAT,

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v.

STATE OF MISSISSIPPI,

Respondent.

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Petition For Writ Of Certiorari To The Supreme Court of Mississippi

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OPINION BELOW

The original decision of the Supreme Court of Mississippi is reported as Wheat v. State, 420 So. 2d 229 (Miss. 1982). The opinion is appended to this petition as Appendix 1.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 6, 1982. On November 26, 1982, an order extending the time in which to file a petition for writ of certiorari to and including January 4, 1983, was issued by the Honorable Byron R. White, Associate Justice (Docket No. A-479). Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

2. This case also involves the following provisions of the statutes of Mississippi:

> §97-3-19. Homicide - murder defined-capital murder.
>
> * * *
>
> (2) The killing of a human being without authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * *
>
> (e) When done with or without any design to effect death, by any persons engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;
>
> §99-19-101. Jury to determine punishment in capital cases in separate

sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circum stances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury

shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§99-13-11. Mental examination of person charged with felony--cost.

* * *

In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court or judge in vacation on motion duly made by the defendant, the district attorney or on the

> motion of the court or judge, may order such person to submit to a mental examination by a competent psychiatrist selected by the court to determine his ability to make a defense; provided, however, any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Mississippi to review a decision of that Court affirming his conviction of murder and sentence of death in the Circuit Court for Harrison County, Mississippi.

Petitioner, a 43-year-old male, was convicted of the murder of Joseph Mayer on January 8, 1980, following a jury trial. That same day, the jury sentenced him to death. R. at 807, 855-856.[1/]

1/ References to the record are as follows:

The events which led to petitioner's conviction began on Saturday, July 28, 1982. On that day, Joseph Mayer and Teresa Carol Hayes were married in Paducah, Kentucky. They left Kentucky in a 1976 Cutlass automobile with Kentucky licence plates, intending to go to the Mississippi gulf coast. By the next day, they reached Gulfport, Mississippi, from which they telephoned their parents. They were seen on Sunday night eating at a local restaurant in Gulfport. R. at 52-58, 77-78,

---

1/ continued

(a) transcript of the trial proceedings as, "R";

(b) transcript of pre-trial hearings and other matters ordered by the Supreme Court of Mississippi to supplement the record as, "R. Supp."

92-94. They were not seen again until their bodies were discovered in a wooded area in Gulfport on Tuesday, July 31, 1979. Their hands and feet were tied behind them and each had been shot in the back of the head. R. at 408-427, 547.

Shortly after the discovery of the bodies was made public, four people, a husband, wife and two sons,[2/] who lived near where the bodies were found, contacted the sheriff's office. They reported that on the Sunday prior to the discovery of the bodies, July 29, 1979, about midnight, a man came to their home and stated that his car had run off the road. Eventually, the husband and two sons drove with the man to where the car had fallen into a ditch. With the use of shovels and a tractor, they freed the car, which was a Cutlass automo-

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2/ The witnesses were Mr. and Mrs. Algie Netto and Garry Walker and Eugene Walker.

bile with Kentucky license plates similar to the Mayer's car, and changed one of its tires. After the automobile had been dislodged, they went back to the house where the driver got a drink of water. Each estimated that they were with the driver for about one and one-half hours. R. at 98-116, 243-254, 333-342, 392-395.

Based on the description given by these witnesses, a composite drawing of the driver was developed and circulated. When the composite was seen by a sheriff of nearby Pearl River County, he reported that it resembled petitioner, who was reared in the county but who had been away for a number of years,[3/] only to return in March, 1979 - four months before the murders. R. at 582-587.

3/ Petitioner had been incarcerated in the New Jersey State Prison from 1962 until 1979, after his conviction for second-degree murder.

While investigating petitioner's whereabouts, authorities learned from his relatives that he had left the area and apparently gone to Florida about the same time of the murders. R. at 596-607, 614-626, 636-656. He had given no forwarding address.

When petitioner discovered from telephone calls to his relatives in Mississippi that he was being investigated for the murders of the Mayers, he mailed a postcard to the mayor of Gulfport, Mississippi, with a picture of several women sunbathing on the front of the following written on the back:

> "Mayor
> Gulfport
> Mississippi
>
> I hear that your [sic] looking
> for me-Ask the CIA - They know.
> So does the Secret Service.
>
> Kenneth Wheat."

R. at 682, 722-724.

Two and one-half months later, on October 19, 1979, petitioner was arrested in Orlando, Florida. When arrested he initially gave his name as "Otis Cox" from Los Angeles, a name appearing on a social security card that he had. Eventually he told the police his real name and that he was wanted in Mississippi for murder. Later he was returned to Mississippi to stand trial. R. at 758-763.

There were two trials arising from the incident. In December, 1979, petitioner was tried and convicted for the murder of Mrs. Mayer. In that case the State sought the death penalty; however, when the jury could not agree on an appropriate sentence, a sentence of life was imposed pursuant to state law. See, Wheat v. State, 420 So. 2d 229, 230 (Miss. 1982). The trial of the case sub judice began on January 14, 1980.

Prior to both trials on November 15, 1979, petitioner's attorney filed in each case a "Motion for Mental Examination," requesting that petitioner be examined by a psychiatrist to determine whether he was competent to stand trial pursuant to Mississippi Code Annotated, Section 99-13-11 (1972). Within the text of the motion, trial counsel informed the court that:

> The Defendant's Counsel has attempted to ascertain facts of the situation surrounding the allegation of the above-mentioned crimes, but has been unable to do so. Defendant is unable to relate such facts, was unable to understand the nature of the charges against him, and is unable to assist counsel in the defense of his case.

R. at 9-9a (App. 2). The State submitted no written opposition to the request. A hearing on the motion was held on November 28, 1979. Before the hearing got underway, counsel stated that he had been instructed by petitioner to ask "that I withdraw the

motion for mental examination and (petitioner) has advised that he would not voluntarily in any event undergo such an examination." R. Supp. at 32-35. Based on petitioner's request, counsel asked that the motion be withdrawn. Thereafter, the court asked three perfunctory questions of petitioner: whether he knew that the motion had been filed; whether he understood that counsel was requesting that the motion be withdrawn; and whether he agreed to the request. Petitioner responded in the affirmative to each; and the motion was allowed to be withdrawn. Id.

The next day, while incarcerated, petitioner sent a handwritten note to the warden of the Harrison County Jail, where he was incarcerated, which read as follows:

> Notify my lawyer and the Sheriff that I want to plead guilty to the Mayer murder

charges tomorrow and I want to be sentenced next week.

/s/

Kenneth Wheat
12/29/79

R. at 712. On the same day petitioner delivered another handwritten not to the warden styled "Press Release", which read as follows:

"Press Release
November 19, 1979

Kenneth Wheat
Harrison County
Gulfport, Mississippi

I am completely innocent of the Mayer murders. In order to spare myself and my family the needless suffering of a lynch mob trial, which I'll only end in a gas chamber verdict, I've decided to plead guilty and I will not appeal. The FBI and Sheriff Hobbs have falsified evidence, pressured witnesses into lying and have fed news media a bunch of lies to make me look like a kill crazy monster. In Orlando the FBI told me they would force Harrison county to drop murder charges if I plead guilty to Federal Judge Wood's murder and they will make sure I get a good sentence.

> They've pressured two uncles in Miami to try to destroy my alibi for Woods murder. My christian faith and my clear conscience will give me the strength I need to endure forthcoming sufferings.

R. at 718.

The next day on November 30, 1979, the State through the prosecutor filed in both cases a "Motion for Mental Examination" (Appendix 3). The motion recited the fact that petitioner had previously filed his own motion for such an examination (which was later withdrawn) and made the court aware of the two handwritten notes. It also recounted the fact that when petitioner was arrested in Florida he gave an interview to the Orlando Sentinel Star newspaper, the contents of which were described as a "farfetched story and . . . [was] the product of a person that is not rational." The motion concluded that "[d]ue to the erratic behavior of the

defendant by his statements, the State of Mississippi feels that an examination is in order." R. at 44-45. A hearing on the State's motion was held on November 30, 1979.

During the hearing on the State's request for a examination, further representations were made by the prosecutor to the court concerning petitioner's irrational behavior:

* * *

> Also if your Honor please, attached to the motion is a copy of the article that we have to assume is true that was published in the Florida Sentier [sic], Orlando Senetier [sic] where this defendant alleges that the FBI set him up. He claims the trial of solving the murder of the late President John Kennedy; and that he was so close on the case that someone set him up in Mississippi to prevent him from uncovering what he allegedly had gathered through a private investigation that he began in March of 1978 when he was payrolled [sic] from the Georgia State Penitentiary.

R. Supp. at 117-118. The prosecutor observed that previously in connection with a New Jersey conviction for a minor offense, it was recommended that petitioner receive psychiatric treatment; and that while he was incarcerated in New Jersey for the murder of one of his relatives, he took hostage a prison psychiatrist who was attempting to treat or examine him. Id. The prosecutor made clear that he was filing the motion in order to "protect the interest of the State." R. Supp. at 119.

Petitioner's counsel objected to the motion apparently because of the petitioner's previous instructions that no such motion should be filed on his behalf. In response to questions from the Court, counsel admitted that there had been some "problems" in communicating with petitioner which he declined to describe because of

the attorney-client privilege; however, counsel opined that he did not think the "problems" were the result of a lack of mental capacity. R. Supp. at 120-123.

Thereafter, the court asked some questions of petitioner during which petitioner responded that he thought he was presently sane and that if the court ordered an examination he would remain silent. When asked if he had ever been treated by a psychiatrist, petitioner responded:

> "Most people who go to prison for a long time require psychiatric help because prisons are snake pits in New Jersey. It's a big insane asylum you know, and . . .
>
> * * *
>
> Yes, Sir. But I'm saying it's not uncommon for a prison or prisoner in Trenton State Prison to be under psychiatric care. The majority of inmates are. And a lot of times they may try to get themselves sent to the State Hospital because it's a lot bet-

> ter place than Trenton Prison. You've got more privileges, so inmates try to play crazy to get sent there, not because they are crazy.

R. Supp. at 125-126. When asked if he ever received a "report" from any psychiatrist petitioner responded that "they keep everything a secret." Id. Finally, when directly asked if he ever was advised to receive psychiatric treatment, he responded:

> They say everybody in prison is crazy. All inmates are crazy. If they weren't crazy, they wouldn't be in prison. That's the way they think, you know? Sane people stay free; and crazy people wind up in prison, you know? I don't think I need any treatment right now. I'm fully prepared to go to trial and communicate with my lawyer.

R. Supp. at 126.

Based on his limited in-court responses, the court concluded that the petitioner was "ration[al], able to communicate with his attorney, [and] has expressed a desire to stand trial." Con-

cerning petitioner's apparently delusional remarks that he was set up on the murder charges because of his personal investigation into the assassination of President Kennedy, the court stated that it was not going to inquire into the reasons for making such statements because it "assumed" that petitioner had a good "motive." The court refused to order a psychiatric examination, expressing its belief that to attempt an examination would be a "waste of time." Petitioner proceeded to the trial for the separate charge of the murder of Mrs. Mayer. R. Supp. at 127-128.

During the course of the first trial, a third motion to have petitioner examined by a psychiatrist was made. On December 7, 1979 after the conclusion of the guilt-innocence phase of the first trial but before the capital sentencing hearing, a written "Motion for a Mental Examination"

was filed by counsel for petitioner. R. Supp. at 47 (Appendix 4). In the motion counsel made clear that the motion was being filed over the objection of petitioner. However, the motion recited:

* * *

> That the Attorney of Record because of statements by the Defendant, and notes kept and made by the Defendant and because of past medical history of the Defendant, is of the opinion that the Defendant is not competent to stand trial at the present time nor could he have been sane at the time he allegedly committed the offense for which he is charged.

* * *

R. Supp. at 47.

A hearing was held the same day during which counsel further indicated that petitioner refused to present any "defense" during the sentencing hearing and that he only wanted to read a short statement, the contents of which were not disclosed.

After consultation with his attorney in open court, petitioner eventually agreed to undergo a psychiatric examination. R. Supp. at 107. However, the court overruled the motion for an immediate examination and proceeded with the capital sentencing hearing with the understanding that any verdict by the jury would be subject to the findings of the post-trial examination. R. Supp. at 111. A sentence of life was imposed and four days later, on December 11, 1979, the examination was ordered by the court. R. Supp. at 57. That examination was never fully conducted or completed.

What occurred after the court entered an order for the post-trial examination was explained on December 20, 1979, during a hearing on petitioner's motion for a new trial after the conviction in his first case. There, counsel explained that petitioner did not want to undergo an

examination, nor did he want to appeal his case. R. Supp. at 18. Petitioner explained that:

> I've been under a lot of pressure to submit to a Psychiatric Examination by a lot of people. And, uh, I definitely don't want to be examined and that's sort of the story.

R. Supp. at 11. Later, petitioner reaffirmed his desire not to appeal the case.

Less than one month later, on January 14, 1980, the trial in the case sub judice began. No examination by a qualified psychologist or psychiatrist was ever administered to petitioner during either trial.

At the trial in the second case, the primary evidence against petitioner consisted of the four persons who identified him as the driver of the automobile which had driven off the road near where the bodies were found, and the postcard and

writings of petitioner indicating his previous desire to plead guilty to the murders. At the conclusion of the evidence, petitioner was found guilty. R. at 807.

A capital sentencing hearing was conducted after which the jury imposed a sentence of death finding the following aggravating circumstances: (1) the murder being committed during the course of the crime of Robbery, i.e., the car belonging to Joseph Mayer; (2) the murder being committed in an especially heinous, atrocious or cruel manner, in that the victim was: bound hands and feet by his own clothing, shot in the back of the head by direct contact, abandoned in a secluded area; (3) the defendant, according to legal documents presented was previously convicted of three felonies: murder (to second degree) dated June 1, 1982, assault

with offensive weapon and false imprisonment dated February 27, 1975, capital murder dated December 7, 1979. R. at 855-856.

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

As discussed in the Statement of Facts, supra, several requests were made before trial to have petitioner examined by a psychiatrist. Petitioner's enumeration of Error No. 1 in the Supreme Court of Mississippi asserted that the trial court erred when it failed to require petitioner to undergo a psychiatric examination. Wheat v. State, 420 So. 2d 229, 232 (Miss. 1982). Petitioner's counsel below failed to assert the Constitutional implications of the trial court's failure to order a competency examination. However, as will be demonstrated in the following section of this brief, the Mississippi courts were

required by the due process clause of the Fourteenth Amendment to make a sufficient inquiry into petitioner's competency to stand trial once information before the court raised a substantial question of his competency.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Mississippi Supreme Court.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO DECIDE WHAT SAFEGUARDS ARE REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO ENSURE A RELIABLE DETERMINATION OF A DEFENDANT'S COMPETENCY TO STAND TRIAL IN A CAPITAL CASE.

Despite information before the trial court which made it abundantly clear that there was a substantial question as to petitioner's competency to understand the proceedings and assist in his defense and

repeated request by both the prosecutor and defense counsel to order a psychiatric examination, the trial court failed to conduct an adequate inquiry into and make a reasoned determination of petitioner's competency to stand trial.

The facts before the court which raised a question of petitioner's competency can be summarized as follows:

1. other courts had previously recommended that petitioner receive psychiatric treatment and he had received such treatment while incarcerated in New Jersey after his conviction for second degree murder in 1962, R. Supp. at 119;

2. during his incarceration in New Jersey petitioner had held hostage a prison psychiatrist who was attempting to treat or examine him, R. Supp. at 119;

3. before his arrest in this case petitioner had notified the Mississippi authorities that the "CIA" and the "Secret Service" knew where he was, R. at 682, 722-724;

4. after his arrest in Florida petitioner stated in a newspaper interview that he was being set up by the FBI for the murders in Mississippi because he was so close to solving the assassination of President Kennedy, R. Supp. at 117-118;

5. without notice to his attorney he submitted in writing his desire to plead guilty to the murders, despite protestation of innocence, because, as indicated in his "press release," the FBI was attempting to set him up for the murder of Federal District Judge Woods, R. at 44-45, 712, 718;

6. trial counsel submitted two written motions describing bizarre behavior on the part of petitioner; that the first motion was withdrawn at the direction of petitioner and the second was filed over his objection, R. at 9-9(a), R. Supp. at 475;

7. the State of Mississippi, through the prosecutor requested that a psychiatric examination be administered due to the "irratic" behavior of the petitioner, R. at 44-45;

8. petitioner's repeated objections to speak to any psychiatrist and his attempts to downplay any past psychological problems by assert-

> ing that "everyone" in prison was crazy. R. Supp. at 11, 18, 126-127.

Despite this evidence of irrational behavior, the trial court limited its inquiry to a few cursory questions and, thereafter succumbed to petitioner's wish that he not be examined by a psychiatrist. The trial court did not even deem it necessary to ask about the most bizarre explanation that petitioner was being set up for the murders because he was close to solving the Kennedy assassination or would not admit to the murder of Judge Woods - deciding it was not appropriate to inquire into the "motive" of the petitioner to make such a claim.

On appeal, the Mississippi Supreme Court rejected petitioner's assertion that he should not have been tried until there was an adequate resolution of the question of his competency, finding that any error

was created by petitioner "alone" by his refusal to voluntarily submit to a psychiatric examination. Wheat v. State, supra. In doing so, the Mississippi Supreme Court departed from the decisions of this Court other state courts and federal courts of appeal requiring trial courts to make an independent evaluation of a defendant's competency. Therefore, this court should grant a writ of certiorari to review the decision of the Mississippi Supreme Court and determine what level of inquiry into competency of a defendant is required by the Eighth and Fourteenth Amendments in a death penalty case where there is evidence of bizarre behavior on the part of the accused, who professes a desire not to undergo any psychiatric examination.

The central inquiry of a determination of a defendant's competency is:

> Whether . . . [the defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402 (1960). Although this test originated under federal criminal statutes, it is beyond question that it is also constitutionally required whenever competency of a criminal defendant is questioned in a state proceeding as well. Drope v. Missouri, 420 U.S. 162, 172, 179-181 (1975). For this Court has made it clear that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of due process right to a fair trial." Drope v. Missouri, supra at 172. Citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also, Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App.

D.C. 117, 120, 223 F.2d 582, 585 (1955). Adequate procedures must be utilized once information before the trial court raises a question of competency.

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

Drope v. Missouri, supra, at 180. Once a question is raised, a state court must conduct an evidentiary hearing and make a reasoned determination regarding competency in order to meet its constitutional obligations. Thus in both Drope and Robinson, this Court although finding that state statutory schemes "jealously guarded" the defendant's right not to be tried while incompetent, reversed convictions because of the failure of the trial courts to

utilize adequate procedures once a question of a defendant's competency had been raised. In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges against him, could cooperate with his attorney and appeared to be mentally alert. Id., at 385-386. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created sufficient doubt of his competency and required further inquiry by the trial court. 420 U.S. at 180.

In deciding when the threshold requirement has been met, state and federal courts have held that an evidentiary

hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, 441 U.S. 881, (1979); Moore v. United States, 464 F.2d 663, 655 (9th Cir. 1972); Rhay v. White, 385 F.2d 893 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal. 2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without

reaching the constitutional question. See, e.g, People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial . . . . Evidence is substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the

> defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue . . . .

Moore v. United States, supra at 666. The Supreme Court of California recently reiterated:

> [A]n erroneous pretrial denial of a competency hearing compels reveral of the judgment, since "the trial court has no power to proceed with the trial once a doubt arises" as to the competency of the defendant . . . " In such cases the error is per se prejudicial. Nor, as the United States Supreme Court specifically held in Pate v. Robinson . . . ., may the error be cured by a retrospective determination of defendant's mental competence during his trial."

People v. Stankewitz, 184 Cal. Rptr. 611, ___, P.2d 578, 586 (1982), quoting People v. Pennington, supra, 66 Cal. 2d at 521. The state of Mississippi has recognized that when there is sufficient doubt

about the competency of the accused, a psychiatric examination and competency determination is required. Stevenson v. State, 325 So. 2d 113 (Miss. 1975). Its trial courts are authorized by statute to order that a criminal defendant undergo a "mental examination" by a competent psychiatrist to determine his ability to "make a defense". Miss. Code Ann. Section 99-13-11 (1972) The Mississippi Supreme Court has held that after such psychiatric examination the trial court is to make a determination of competency. Stevenson v. State, supra. Here, however, the court received no evaluation of the petitioner because of his own insistence that he did not need one. It did not obtain and review any documentation of the past mental health problems of the petitioner. Instead, it limited its inquiry to

two short, in-court interviews with him. Such superficial questioning was not sufficient for a proper psychiatric evaluation of petitioner and does not comport with constitutional requirements of due process.

Courts have repeatedly recognized the importance and value of psychiatric examinations when making a determination regarding a person's competency. See e.g. Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981), United States v. Davila Nater, 474 F.2d 270 (5th Cir. 1973) United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1973) cert. denied, 409 U.S. 1044, Blunt v. United States, 389 F.2d 545 (D.C. Cir. 1967), Caudill v. Peyton, 368 F.2d 563 (4th Cir. 1966), Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966), United States v. Day, 353 F.2d 123 (6th Cir. 1965), Jones v. United States,

327 F.2d 867, 875 (D.C. Cir. 1963), (Wright, J., concurring.) Although not binding on a trial court, the results of such examinations allow the court to properly evaluate answers given by a defendant in response to any questioning by the court. And, it is incumbent upon the court to establish a setting and relationship between the subject and the expert to allow for a proper evaluation. Hayes v. Murphy, supra. However, in petitioner's case there was no attempt by the trial court to create a setting for a proper evaluation.

On a number of occasions during both trials, petitioner, without explanation declared his intentions not to speak to a psychiatrist. Rather than heighten the court's scrutiny of petitioner's self-professed "sanity", petitioner's declarations

seemingly foreclosed further inquiry by the court. R. Supp. at 127. The trial court's cavalier conclusion that it would be a "waste of time" to undertake further attempts to have petitioner examined contradicts the generally accepted notion that such examinations often require extended and close observations of the subject. See Hayes v. Murphy, supra. The court made no further inquiry regarding petitioner's reluctance to speak to a psychiatrist, it did not attempt to seek alternative methods of obtaining a mental evaluation; and it made no efforts to have the records of petitioner's earlier treatment for mental disorders brought before it. Without any diagnosis of petitioner's mental disorder or any understanding of the nature, extent and duration of those problems, the trial court was not in a

position to make a reliable determination of petitioner's competency to stand trial.

In essence, both the trial court and the Mississippi Supreme Court held that petitioner had de facto "waived" his right to a competency determination because of his refusal to talk to the State's psychiatrist. In Pate v. Robinson, supra, this Court observed "it is contradictory to argue that a defendant may be incompetent yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. In his dissenting opinion in that case Mr. Justice Harlan pointed out that if there were errors on the question of competency "such an error is not 'waived' by failure to raise it . . . . Waiver is an apposite concept where we premise a defendant so deranged that he cannot oversee his law-

yers." Id. at 388 (Harlan, J., dissenting). Moreover, state and federal courts have squarely held that the issue of competency was not waived by failure to assert it prior to trial where evidence raising the issue was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so . . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State

v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 225 N.W.2d at 709-10.

The petitioner's reluctance to speak to a psychiatrist did not abrogate the trial court's constitutional responsibility to obtain sufficien facts about petitioner's mental state to make an informed decision about his competency. Here, the trial court, on the basis of two brief colloquies with the petitioner in open court and without obtaining any expert analysis, any diagnosis, any mental helath history or any other data about the mental health of the petitioner, allowed petitioner to be the judge of his own competency. Obviously, in another context, such as where the state seeks to obtain the involuntary commitment of one of its citizens to a mental institution, such a

result would be completely untenable. It is even more untenable here, where the state sought and obtained the death penalty. If the decision to impose death is to be a reliable one, there must be every assurance that the defendant understands the proceedings leading to that result and is able to consult with and assist counsel in defending him. Otherwise, there is the substantial risk that the defendant will make irrational decisions on matters of fundamental importance in the presentation of his case such as whether to present certain defenses[4/] or whether to offer

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4/ See, e.g., People v. Stankewitz, supra, where the question of competency was raised when his counsel informed the court that he and his client had reached impasse on whether to present the defense of misidentification or diminished capacity. 648 P.2d at 583. Obviously, a client who does not realize that he has serious mental problems cannot make a rational decision on whether to present an insanity defense.

evidence in mitigation. Such irrational decision making in the conduct of the defense undermines the reliability required in the process for determining whether to impose death. Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell and Stevens, JJ.).

Therefore, petitioner asks this Court to issue a writ of certiorari to review the decision below and decide what process is due once a substantial question as to the competency of the accused is raised in a capital case.

4/ continued

Nor is it reasonable to assume that a person suffering from paranoid delusions can make a rational decision not to offer evidence of his mental problems in mitigation at the sentencing stage of a capital trial.

CONCLUSION

For the reasons set forth in this petition, petitioner prays that this Court issue a writ of certiorari to review the decision of the Supreme Court of Mississippi.

Respectfully submitted,

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